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No. 411

# In the Supreme Court of the United States

OCTOBER TERM, 1951

YVETTE J. MADSEN, PETITIONER

*v.*

NINA KINSELLA, WARDEN, U. S. REFORMATORY FOR WOMEN

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT

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## BRIEF FOR THE RESPONDENT

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 116–124 [1]) is reported at 188 F. 2d 272. The

[1] The record in the Court of Appeals below has been certified to this Court in two parts. The first part contains the proceedings in the District Court for the Southern District of West Virginia (pp. 1–202) and proceedings in the Court of Appeals for the Fourth Circuit (pp. 203–221). The second part contains the printed joint appendix below (pp. 1–114), and the proceedings in the Court of Appeals (pp. 115–125), and has been printed.

The designation "Tr." refers to the first part of the record and the designation "R." refers to the printed record.

opinion of the District Court (R. 78–93) is reported at 93 F. Supp. 319.

## JURISDICTION

The judgment of the Court of Appeals was entered April 2, 1951 (R. 125). On June 25, 1951, by order of the Chief Justice, the time within which to file the petition for a writ of certiorari was extended to and including July 31, 1951 (R. 125). The petition was filed on July 26, 1951, and was granted on November 5, 1951 (R. 126). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

## QUESTIONS PRESENTED

1. Whether the United States Court of the Allied High Commission had jurisdiction to try for murder committed in Germany the civilian wife of a United States Air Force officer residing with him in the United States area of control in Germany.

2. Whether the tribunal by which petitioner was convicted of murder was lawfully constituted and employed lawful procedures.

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision and statutes involved are set forth in the Appendix, *infra*, pp. 77–79.

## STATEMENT

Petitioner was tried and convicted by the tribunal originally entitled the "United States Mili-

tary Government Court for Germany," later entitled the "United States Court of the Allied High Commission for Germany," upon the charge that on October 20, 1949, in the United States Area of Control in Germany, she shot and killed her husband, a lieutenant serving in the United States Air Force (R. 30, 34, 36–37). Petitioner instituted habeas corpus proceedings in the District Court for the Southern District of West Virginia, challenging the jurisdiction of the tribunal which tried and sentenced her (R. 3–8). The District Court refused to discharge petitioner (Tr. 196–197) and its decision was unanimously affirmed by the Court of Appeals for the Fourth Circuit R. 116–125). The habeas corpus proceeding was tried upon the basis of exhibits and an agreed statement of facts (R. 27–78), which may be summarized as follows:

Petitioner is a citizen of the United States. In or about the month of November 1947, she and her husband entered the United States Zone of Occupied Germany (R. 27).[2]

[2] Petitioner was transported to Germany by the Army, and she and her husband were granted billets requisitioned by the Army for military use. She was permitted use of facilities maintained by the Army for its personnel. In general she enjoyed all immunities from German jurisdiction granted persons in the armed forces of the United States (R. 27–28). Certain immunities from the jurisdiction of German courts were granted to nationals of the United Nations or to "members of the families" of the armed forces by Military Government Law No. 2 and Allied High Commission Laws Nos. 2 and 13 (R. 102, 111–112, 113).

Military government had been established in Germany by General Eisenhower in July 1945 (R. 102–103). By Military Government Proclamation No. 2, dated September 19, 1945, "the German law in force at the time of the occupation" was declared "applicable in each area of the United States Zone of Occupation," except as repealed or superseded by the Military Government or other competent authority (R. 103). The composition, jurisdiction, and proeedure of the first military government courts in Germany were set forth in Military Government Ordinance No. 2 (R. 100–101). Such courts had jurisdiction "over all persons in the occupied territory except persons other than civilians who are subject to military, naval or air force law * * *." The courts had jurisdiction, *inter alia,* over:

> (i) All offences against the laws and usages of war.
>
> (ii) All offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces.
>
> (iii) All offences under the laws of the occupied territory or of any part thereof.

Military Government Law No. 2 denied the courts of Germany jurisdiction over "[c]riminal cases involving * * * a dependent accompanying [any person serving with the Armed Forces of any of the United Nations], or [a]ny national of the United Nations * * * " (R. 102).

By Military Government Ordinances Nos. 31, 32, and 33 (14 Fed. Reg. 124–133), effective August 18, 1948, the court system was revised to establish the United States Military Government Courts for Germany upon a district basis with a Court of Appeals for the United States Area of Control (R. 104–105). The criminal jurisdiction of the Military Government Courts was defined in Article 7 of Ordinance 31, as follows:

> *Article 7, jurisdiction of District Courts in criminal cases.* (1) District Courts shall have criminal jurisdiction over all persons in the United States Area of Control except persons, other than civilians, who are subject to military, naval or air force law and are serving with any forces of the United Nations. No person subject to military law of the United States shall be brought to trial for any offense except upon authorization of the Commander in Chief, European Command. No member of an Allied Mission, visiting governmental official, or person subject to the military law of any country other than the United States, shall be brought to trial for any offense except upon authorization of the Military Governor.
>
> (2) District Courts shall have jurisdiction to hear and decide cases involving:
>
> (i) Offenses under legislation issued by or under the authority of the Allied Control Council;
>
> (ii) Offenses under United States Military Government Legislation;

(iii) Offenses under German law in force in the Judicial District of the Court.

On December 11, 1948, by command of General Clay, Commander in Chief of the European Command, United States Army, authorization was given "for trial of any dependent of a member of the United States Armed Forces * * * for any non-military offenses before the appropriate Military Government Court established by Military Government Ordinance No. 31 unless, in a particular case, this headquarters had directed trial by Court Martial" (R. 71).[3] Later, a similar authorization was given with respect to civilian employees of the Armed Forces.

The potential jurisdiction of these courts may be measured by the fact that the United States Area of Control has a German population of about 17,000,000, together with a varying number of United Nations nationals including refugees. As of November 30, 1949, there were in Germany approximately 34,000 dependents of members of the United States Armed Forces, plus 4,700 civilian employees with 5,000 dependents. Other United States agencies, such as the State Department, had 4,100 employees in Germany.[3a] The courts have been handling at least 1,000 criminal cases per month including, it is estimated, from 25 to 30 cases involving American civilians.

[3] For a general account of the development of the Military Government courts, see Gen. Lucius D. Clay, *Decision In Germany* (1950), pp. 246-248.

[3a] Both groups of civilian employees presumably include some aliens.

In April 1949, the Governments of the United States, the United Kingdom, and France agreed to the establishment of a provisional, limited German Federal Republic in their zones and to the establishment of an Allied High Commission composed of one High Commissioner of each of the three occupying powers as the supreme agency to exercise control. This plan became effective September 21, 1949, and the supreme authority in the United States Area of Control became the United States High Commissioner appointed by the President. Offices and officials with new titles were established under the Office of the United States High Commissioner for Germany. However, former military government laws remained in effect unless specifically changed, and the courts established under Military Government Ordinance No. 31 became responsible directly to the United States High Commissioner. Courts of the German Federal Republic, as before, were not allowed jurisdiction over members of families of occupation force personnel.[4]

[4] Certain details of the above steps taken in 1949 may be set forth as follows:

By Executive Order of the President 10062, dated June 6, 1949, the position of United States High Commissioner was created. The order provided, *inter alia*, that the Commissioner should be "the supreme United States authority in Germany," and further provided, *inter alia* (R. 58–59):

"* * * The High Commissioner shall have the authority, under the immediate supervision of the Secretary of State (subject, however, to consultation with and ultimate direction by the President), to exercise all of the govern-

The foregoing organizational structure was in effect on October 20, 1949, when petitioner was arrested by military police. On October 21, 1949,

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mental functions of the United States in Germany (other than the command of troops) * * *.

"3. With respect to military matters the Commander of the United States Armed Forces in Germany shall continue to receive instructions directly from the Joint Chiefs of Staff. On request of the High Commissioner, such Commander shall take the necessary measures for the maintenance of law and order and such other action as is required to support the policy of the United States in Germany. If major differences arise over policy matters affecting military matters, necessary reports and recommendations shall be referred to the Department of State and to the National Military Establishment for resolution. In the event of an emergency involving the security of the United States forces in Europe, such Commander may take whatever action he considers essential to safeguard the security of his troops.

"4. In the event that the High Commissioner shall assume his duties in accordance with this Executive Order prior to the date that the Military Government of the United States Zone of Germany is terminated, he shall, during such interval, report to the Secretary of Defense through the Secretary of the Army and shall be the United States Military Governor with all powers thereof including those vested in the United States Military Governor under all international agreements."

The Occupation Statute and the Charter of the Allied High Commission for Germany, which became effective September 21, 1949 (R. 41–53, 108–109), provided, *inter alia*, that the German people should enjoy "self-government to the maximum possible degree consistent with [the] occupation," but reserved powers in various fields, including "Protection, prestige, and security of Allied forces, dependents, employees and representatives, their immunities" and "Control * * * over the carrying out of sentences" imposed by "courts or tribunals of the occupying Powers or occupation authorities" and over "amnesty, pardon or release," and reserved general authority to the occupying Powers to "re-

she was charged with murder under Section 211 of the German Criminal Code before the United

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sume, in whole or in part, the exercise of full authority if they consider that to do so is essential to security or to preserve democratic government in Germany or in pursuance of the international obligations of their Governments." The Statute also provided that "[l]egislation of the occupation authorities enacted before the effective date of the Basic Law shall remain in force until repealed or amended by the occupation authorities * * *." (R. 109–111.)

Under the Charter of the Allied High Commission "all authority with respect to the control of Germany or over any governmental authority thereof, vested in or exercised by the respective Commanders in Chief of the forces of occupation of the three powers in Germany" would be "transferred to the three High Commissioners respectively to be exercised in accordance with the provisions [of the Charter] and of the Occupation Statute" (R. 41). Each High Commissioner would be responsible to his Government with respect to his zone for the matters in fields reserved to the occupation authorities, including, *inter alia*, the fields mentioned *supra* and the "administration of justice in cases falling within the jurisdiction of Allied Courts" (R. 50).

On September 21, 1949, by Staff Announcements Nos. 1 and 5, the "Office of the U. S. High Commissioner for Germany" was established, the authority residing in the "U. S. Military Governor" and the "Office of Military Government for Germany (U. S.)" was assumed by the High Commissioner, and it was provided that the courts functioning under Military Government Ordinance No. 31 (see *supra*, p. 5) were to form "an independent judicial unit responsible directly to the United States High Commissioner" (R. 67–69). In the organization chart forming part of Staff Announcement No. 1, the United States Military Government Courts for Germany appeared under the title "U. S. High Commission Courts," and in Staff Announcement No. 5, the courts were referred to as "The United States Courts for Germany (established as the United States Military Government Courts for Germany pursuant to Military Gov-

States Military Government Court.[5] A summons containing a copy of the charge and particulars was personally served upon her (R. 28).[6] After a preliminary hearing at which petitioner and her counsel were present, petitioner was held for trial (R. 29). She was brought to trial on

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ernment Ordinance No. 31)," although the official change of name was not made effective until January 1, 1950 (R. 67–69, 114).

Somewhat similarly to the earlier Military Government Law No. 2 (see *supra*, p. 4), Allied High Commission Law No. 13, effective January 1, 1950 (15 F. R. 1056), in conjunction with Allied High Commission Law No. 2, September 21. 1949 (14 F. R. 7457), prohibited exercise of jurisdiction by German courts over "members of the families" of members of the occupation forces (R. 111–113).

[5] Section 211 of the German Criminal Code reads as follows in English translation (R. 29):

*Murder—Mord*

"211. (*As in force prior to 4 September 1941*). Whoever intentionally kills a human being is guilty of murder if the killing was accomplished with premeditation, and shall be punished by death.

"211. (*As amended 4 September 1941, RGBl I, 549*). The murderer shall be punished by death.

"A murderer is hereby defined as one who kills a human being out of the morbid desire to kill (Mordlust);

"For the satisfaction of sexual desire;

"For cupidity (Habgier) or any other base motives;

"In a treacherous or cruel manner or by means causing common danger, or

"In order to make possible or to conceal another offense.

"If, in especially exceptional cases, the death penalty is not suitable (angemessen), punishment of confinement for life in a penitentiary shall be imposed."

[6] The agreed statement of facts also recites that a copy of the charges was served on petitioner on November 1, 1949 (R. 30). This copy, including notice of "Rights of the Accused" appears at R. 34–36.

February 20, 1950 (R. 30). In accordance with United States Military Government Ordinance No. 31 (R. 105), the court before which petitioner was tried was composed of three United States civilians, two of whom had been appointed as district judges, and one of whom had been appointed as magistrate (R. 30). The court adjudged petitioner guilty as charged and, under the applicable provisions of the German Criminal Code, sentenced petitioner to 15 years of confinement (R. 30–31.) The United States Court of Appeals of the Allied High Commission for Germany affirmed the judgment of the lower court (R. 36–37).[7] After the petitioner was brought back to the United States to serve her sentence, she filed the petition for a writ of habeas corpus involved in this proceeding.

## SUMMARY OF ARGUMENT

### I

Petitioner, the wife of an Air Force officer stationed in the United States Zone of occupied Germany, contends that only a general court-martial had jurisdiction to try her for murder

[7] The higher court, however, changed the part of the judgment committing petitioner to "The Federal Reformatory for Women, Alderson, West Virginia, or elsewhere as the Secretary of the Army may direct," so that petitioner was committed to the custody of the Attorney General of the United States or his authorized representative. The Director of the Bureau of Prisons then designated the above reformatory as the place of confinement (R. 66).

committed in Germany. In the 1916 revision of the Articles of War, "persons accompanying * * * the armies of the United States without the territorial jurisdiction of the United States" were included by AW 2(d) in the class of "persons subject to military law"; also by Article 92 courts martial were empowered to try "any person subject to military law" for murder committed outside the United States. The result of these amendments was to give courts-martial jurisdiction to try petitioner, as the wife of a soldier in Germany, for murder committed in Germany. However, the 1916 revision of the Articles of War added a new AW 15 providing that "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." The Government contends that AW 15 preserved the historic jurisdiction of military government courts to try petitioner for murder committed in occupied Germany.

To sustain her contention in the face of AW 15, petitioner must show that prior to the 1916 revision of the Articles of War military government courts (whether entitled as such or as military commissions or other war courts) would have had no jurisdiction to try a civilian in her

position for the offense with which she was charged. She attempts to do this by alleging that even prior to 1916 a court martial would have had exclusive jurisdiction to try her for murder.

A. To the contrary, it is absolutely clear that since at least 1847 military government courts (often entitled military commissions, provost courts, and provisional courts) have exercised jurisdiction to try American civilians in occupied territory for murder and other civil offenses. Under international law, it is the duty of an occupying power to maintain order in the occupied territory. The decisions of this Court recognize the power of the President, as Commander-in-Chief of the Armed Forces, to discharge this duty by establishing military government courts with criminal jurisdiction over crimes which ordinarily would be tried by the civil courts. The President may establish such tribunals directly or through his military governors and he may staff them with civilian judges. It is undisputed that such tribunals tried American civilians for such crimes as murder committed in occupied territory.

Petitioner must show that at some time prior to 1916 military government courts lost their historic jurisdiction to try her for murder committed in occupied territory. The fact is that prior to 1916 petitioner could not have been tried by a court martial, while she could have been tried by a military government court.

B. AW 15 on its face indicates a Congressional purpose to preserve to military commissions and other war courts the jurisdiction over persons and offenses which they had possessed prior to 1916. The detailed and uncontradicted testimony of General Crowder, the Judge Advocate General, before the Senate and House Committees, makes clear that AW 15, of which he was the principal sponsor, was intended to preserve, *inter alia,* the jurisdiction of military government courts (by whatever name called) to try American civilians accompanying the armed forces abroad for civil crimes committed in occupied territory.

Moreover, prior to 1916, the former AW 63 subjected to military law only civilians falling into the classes of "All retainers to the *camp,* and all persons serving with the armies of the United States *in the field,* though not enlisted soldiers." [Emphasis supplied.] Since such persons were made subject to military discipline only in time of and in the vicinity of hostilities, there was considerable doubt as to whether they were subject to trial by court martial during periods of military occupation characterized by the absence of military operations against an enemy. Since this doubt was one of the factors leading to the revision of AW 2 in 1916, it could have been argued that under the earlier Articles no American civilian in Germany in 1949 was subject to trial by court martial.

At any rate, it seems clear that prior to 1916 only civilians bearing a functional relationship to the army as a fighting force were subject to military law, either as "retainers to the camp" or as "persons serving with the armies of the United States in the field," thus excluding soldiers' dependents even when following the army. This is confirmed by the fact that no case has been found where a soldier's wife or other dependent was tried by an American court martial prior to 1916.

In any event, it is entirely clear that prior to 1916 courts martial *never* had jurisdiction to try *any* civilians for such civil crimes as murder. Until 1863, courts martial lacked jurisdiction to try even soldiers for such crimes. Section 30 of the Enrollment Act of 1863 for the first time empowered courts-martial and military commissions "in time of war, insurrection, or rebellion" to try "persons who are in the military service of the United States" for murder and other enumerated crimes. With the deletion of the reference to military commissions in 1874, this section became and remained AW 58 of the Articles of War up to the 1916 revision. This statute did not, as petitioner contends, empower courts martial to try "persons subject to military law" for such crimes as murder. It did not even empower courts martial to try civilians who were retainers to the camp or serving with the armies in the field for such crimes. Rather, it conferred such juris-

diction only as to "persons in the military service of the United States," a phrase which the Attorney General in 1878, and the Judge Advocate General in 1914, declared to mean, in effect, only officers and enlisted men of the Army. Thus, prior to 1916, *only* military government courts had jurisdiction to try American civilians for murder committed in occupied territory.

C. We believe that it is particularly in accord with American political traditions to provide for the trial of American civilians in Germany a system of courts staffed with civilians and applying a procedure which guarantees every familiar element of due process of law except trial by jury. The British occupation authorities have established similar courts in their area of occupation. Together, the two systems illustrate the Anglo-American tendency to provide civilian courts for the trial of civilians.

D. Since the question involves only the construction of the Articles of War to determine whether Congress has vested in courts martial exclusive jurisdiction to try such American civilians as petitioner for such crimes as murder, we believe that it is decisive of this case that in 1950, Congress, with knowledge that soldiers' wives, such as petitioner, were being tried for civil crimes by the Military Government Courts for Germany, reenacted AW 15 without change as Article 21 of the Uniform Code of Military

Justice. Moreover, for the last two fiscal years, Congress has appropriated funds for "expenses incident to maintaining discipline and order in occupied areas (*including trial and punishment by courts established by or under authority of the President*)." [Italics added.] Clearly, Congress has ratified the construction of AW 15 to provide for the trial by military government courts of American civilians such as petitioner for civil crimes committed in occupied Germany.

## II

Petitioner challenges (1) the power of the United States High Commissioner for Germany to establish the tribunal which tried her, (2) the civilian composition of that tribunal, (3) the power and right of the United States to exercise functions of military government in Germany after September 21, 1949 (when she alleges that the military government terminated), (4) her trial and conviction for a violation of the German Criminal Code, and (5) the validity of her trial by any procedure other than the detailed procedure prescribed by the Articles of War.

The first two contentions have been resolved against petitioner by historic American practice as approved by this Court. The third contention has been held to present only a political question. As to the fourth, the application of the German Criminal Code to petitioner was in accordance

with international law and American practice. As to the fifth, petitioner does not even allege a violation of any of the Articles of War which are specifically applicable to military tribunals other than courts martial. To require complete conformity to the Articles, particularly when coupled with petitioner's contention that the court should have been composed of army officers, would completely destroy the war tribunals which AW 15 was enacted to preserve.

## ARGUMENT

### I

### THE PETITIONER, AS THE WIFE OF AN AIR FORCE OFFICER STATIONED IN GERMANY, WAS SUBJECT TO TRIAL BY A MILITARY GOVERNMENT COURT FOR HOMICIDE COMMITTED IN GERMANY

The petitioner contends that, as the wife of an Air Force officer serving with the United States Forces in Germany, she is a person "accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States" and is thus a "person subject to military law" within the meaning of AW 2. From this she concludes not only that she was subject to trial by a general court-martial for the killing of her husband in occupied Germany, but also that the jurisdiction of the general court-martial was exclusive, thereby precluding her trial by a military government court.

We concede that petitioner could have been tried by a general court-martial. However, we

contend that the 1916 amendments to the Articles of War, which subjected petitioner to trial by court martial on a charge of murder, specifically preserved the jurisdiction of a military commission or military government court to try persons in her status for such offense. Thus, we shall show (1) that prior to 1916 petitioner could have been tried for murder only by a military tribunal other than a court martial, (2) that the increased jurisdiction given to courts-martial in 1916 was not exclusive, but concurrent with that previously exercised by such other military tribunals, and (3) that Congress has clearly ratified the construction of the Articles of War under which petitioner was tried by a military government court, rather than by a general court-martial.

A. It Is Well Established That, Absent Any Statute, the President Either Directly or Through His Military Commanders and Military Governors Could Establish Military Government Courts With Jurisdiction To Try Petitioner for Homicide Committed in Occupied Territory

Leaving aside the Articles of War, it is clear that the President had power to establish military government courts in occupied Germany, and to give such courts criminal jurisdiction over both Germans and American civilians. Moreover, he could exercise this power either directly or through his military governors, regardless of whether the latter were soldiers or civilians, and such courts could be composed of either soldiers or civilians.

With the conquest and surrender of Germany in May 1945, and its division into four zones for the purposes of military occupation, the United States assumed the powers and duties of an occupying power with respect to the United States Zone of occupied Germany. Under international law, the occupying power assumes responsibility for the maintenance of law and order in the occupied territory. *The Grapeshot,* 9 Wall. 129.[8]

Article II, Section 2, of the Constitution provides that "The President shall be Commander in Chief of the Army and Navy of the United States * * *." The authority of the President to establish military government in conquered enemy territory in his capacity as Commander in Chief of the Armed Forces has been repeatedly recognized by this Court. In *Cross* v. *Harrison,* 16 How. 164, 190, the Court said:

> Early in 1847 the President, as constitutional commander in chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered territory. * * * No

[8] This principle is recognized in Article 43 of the Hague Regulations as follows:

"The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country" (36 Stat. 2306).

> one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them, was according to the law of arms and the right of conquest, or that they were operative until the ratification and exchange of a treaty of peace.

In *The Grapeshot, supra,* the Court said, at page 132, that the duty of the occupying power to provide a provisional government "was a military duty, to be performed by the President as commander-in-chief, and intrusted as such with the direction of the military force by which the occupation was held." See also, *Mechanics' and Traders' Bank* v. *Union Bank,* 22 Wall. 276; II Halleck, *International Law,* 1893 ed., 444.

The establishment and maintenance of occupation courts is but a part of the authority to establish and maintain military government. In our own history, both the practice and law on this subject have been clear since the Mexican War. General Scott, in an order of February 19, 1847, provided that various offenses, including murder, committed "by any inhabitant of Mexico, sojourner or traveller therein" or "*by any individual of the [United States] forces, retainer or follower of the same*" upon another inhabitant, sojourner, or traveler, or upon "*any other individual of the same forces,*" retainer or follower of the same, should be brought to trial before "military commissions." [Emphasis supplied.] The basis was

stated to be the "unwritten code all armies in hostile countries are forced to adopt," referring to the army's "own safety" as well as to protection of inhabitants against injuries by the army "contrary to the laws of war." Birkhimer, *Military Government and Martial Law* (3d Ed., 1914) App. I, pp. 581–582; Winthrop, *Military Law and Precedents* (2d Ed., reprinted in 1920, pp. 831–833). The commissions were repeatedly convened, mostly in 1847, and included the case of a United States Army captain who was alleged to have murdered another officer. Winthrop, *op. cit.* 832.[9]

In *Leitensdorfer* v. *Webb,* 20 How. 176, 178, this Court took for granted the power of General Kearney, upon the conquest of New Mexico, to establish circuit courts and an appellate court and to confer upon the circuit courts jurisdiction over all criminal cases not otherwise provided for by law and all civil cases not cognizable before the prefects and alcades.

During the Civil War, military tribunals other than courts martial were extensively employed as early as 1861, before the Enrollment Act (*infra,* p. 47), and throughout the war and the ensuing periods of military occupation. Winthrop, *op. cit.* 833. A Provisional Court for Louisiana was established by order of President Lincoln in October

[9] The circumstances of this case are set forth in 5 Ops. A. G. 55.

1862,[10] with a civilian judge and with both civil and criminal jurisdiction. When the civil jurisdiction of the Provisional Court was sustained by this Court in *The Grapeshot*, 9 Wall. 129, 133, it was said that, "We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war." Its criminal jurisdiction was upheld in a murder case by the Provisional Judge in an exhaustive and well-reasoned opinion based upon decisions of this Court. *United States* v. *Reiter*, 27 Fed. Cas. No. 16146. A military governor's appointment of a civilian as judge was treated as valid in *Handlin* v. *Wickliffe*, 12 Wall. 173, 174–175.

In *Mechanics' Bank* v. *Union Bank*, 22 Wall. 276, 297, the commanding general of the forces occupying New Orleans had established a provost court. It was contended in this Court that he "had no authority to establish such a court;" that the President alone, as commander in chief, had such authority. Rejecting this contention, the Court stated:

> * * * General Butler was in command of the conquering and occupying army. He was commissioned to carry on the war in Louisiana. He was, therefore, invested with all the powers of making war, except

[10] The text of this order is set forth in *Mechanics' Bank* v. *Union Bank*, 22 Wall. 276, 279.

> so far as they were denied to him by the commander in chief, and among these powers, as we have seen, was that of establishing courts in conquered territory. It must be presumed that he acted under the orders of his superior officer, the President, and that his acts, in the prosecution of the war, were the acts of his commander in chief.

The various Mexican and civil war military commissions tried over 2,000 cases, including the cases of 100 women. Winthrop *op. cit.* pp. 834, 838. The same principles were applied to uphold the military commissions or military government courts established in Cuba and Porto Rico during and following the war with Spain. *Ex parte Ortiz,* 100 Fed. 955 (C. C. D. Minn.), upheld the conviction by a military commission of a native of Porto Rico charged with the murder of an American soldier. In *Santiago* v. *Nogueras,* 214 U. S. 260, this Court found power in the President as Commander in Chief to establish a Provisional Court or military government court in Cuba even after ratification of the treaty of peace which ceded Porto Rico to the United States. See also *Neely* v. *Henkel,* 180 U. S. 109, discussed *infra,* p. 45.

The jurisdiction of military commissions has been summarized in the Digest of Opinions of the Judge Advocate General of the Army (1912), pp. 1066–1067, as follows:

> By a practice dating from 1847 and renewed and firmly established during the

Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of courts-martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offenses which in war would go unpunished in the absence of a provisional forum for the trial of the offenders. * * *

* * * Military commissions are authorized by the laws of war to exercise jurisdiction over two classes of offenses, committed, whether by civilians or military persons, either (1) in the enemy's country during its occupation by our armies and while it remains under military government, or (2) in a locality, not within the enemy's country or necessarily within the theater of war, in which martial law has been established by competent authority. The two classes of offenses are: I. Violations of the laws of war. II. Civil crimes, which, because the civil authority is superseded by the military and the civil courts are closed or their functions suspended, can not be taken cognizance of by the ordinary tribunals. In other words, the military commission, besides exercising under the laws of war a jurisdiction of offenses peculiar to war, may act also as a substitute, for the time, for the regular criminal judicature of the State or district.

In brief, by 1916 it was settled that under the conditions of a military occupation the President, either directly or through his military governors, or his military governors presumed to be acting on his behalf, could establish military government courts in occupied territory, vest both civil and criminal jurisdiction in such courts, and appoint either military men or civilians to act as judges. The criminal jurisdiction of military government courts included civil crimes, whether committed by inhabitants of the occupied territory, American civilians or (until 1863, see *infra* p. 46) soldiers of the occupying forces. This jurisdiction of military tribunals other than courts martial was, of course, in addition to their jurisdiction over violations of the laws of war recognized in *Ex parte Quirin*, 317 U. S. 1, and *In re Yamashita*, 327 U. S. 1, and the jurisdiction expressly conferred upon them by such statutes as AW 80–83.

Thus, the petitioner was clearly subject to trial by a military government court in Germany for murder committed in Germany, unless Congress has vested general courts-martial with exclusive jurisdiction over persons in petitioner's status or over the offense with which she was charged.

B. The 1916 Revision of the Articles of War Expressly Preserved in AW 15 the Jurisdiction of Military Government Courts to Try Petitioner for Murder, Although Conferring Upon Courts-Martial a Concurrent Jurisdiction, Which They Theretofore Lacked, to Try Her for That Offense

The petitioner's principal contention is that a general court-martial possessed exclusive juris-

diction to try her for murder. To sustain this contention, she must show, as she attempts to do, that prior to 1916 a military government court or military commission would have lacked jurisdiction to try her for murder committed in occupied territory and, therefore, that no such jurisdiction was preserved to such war courts by AW 15. To the contrary, it is clear that prior to 1916 a court martial had no jurisdiction to try petitioner or any other civilian on a charge of murder, that a military government court or military commission possessed and exercised such jurisdiction, and that AW 15 preserves and was intended to preserve the latter jurisdiction concurrent with the jurisdiction over such persons and offenses which, in 1916, was for the first time conferred upon courts martial.

*The Articles of War before and after 1916.* Prior to the 1916 revision of the Articles of War, AW 63 subjected to the jurisdiction of courts martial the following civilians: "All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers." Winthrop, *op. cit.* p. 991.[11] In 1916, AW 12 gave courts martial jurisdiction over "any person subject to military law", a phrase which was defined in AW 2 (d) to include "All retainers to the camp and *all persons accompanying* or serving with the armies of the

[11] The appendix to Winthrop's *Military Law and Precedents* contains the texts of the various Articles of War to and including the revision of 1874.

United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles:". [Italics added.] As we will point out later, this resulted in a substantial broadening of the class of civilians subject to court martial jurisdiction.

Also, prior to 1916, the former AW 58 empowered general courts martial "in time of war, insurrection, or rebellion," to try "persons in the military service of the United States" for such serious civil crimes as murder, robbery, and arson. Under the 1916 revision, AW 92 and 93 subjected "any person subject to military law" to trial by general court martial for murder and rape committed outside the United States and for such other crimes as robbery, arson, assault and larceny wherever committed. Thus, the 1916 revision of the Articles of War not only increased substantially the class of civilians triable by courts martial, but it also greatly increased the class of offenses for which such civilians could be tried by courts-martial.

It would appear that the petitioner was "accompanying" the armies of the United States in Germany and was therefore a "person subject to military law" who, since 1916, could have been tried by a general court-martial for murder com-

mitted in Germany. However, while the 1916 revision was substantially broadening the jurisdiction of courts martial over persons and offenses, it also added AW 15 providing that:

> The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals.

It will be noted that the concurrent jurisdiction which is preserved for military tribunals other than courts martial relates to both the *offenders* and the *offenses* "that [by statute or] by the law of war may be lawfully triable by such" other tribunals. Leaving aside the limited statutory[12] jurisdiction of such military tribunals, we must determine whether prior to 1916 courts martial had acquired exclusive jurisdiction over civilians in the status of the petitioner, at least when charged with murder. For, if prior to 1916 she was subject to trial on a charge of murder by a military government court, the jurisdiction of the latter tribunal was preserved by AW 15.

This Court has already held that AW 15 effectively preserved the jurisdiction of a military commission to try offenses against the law of

[12] The words "by statute or" were added in 1920.

war. *Ex parte Quirin,* 317 U. S. 1; *In re Yamashita,* 327 U. S. 1, although offenders against the law of war have been triable also by court martial since 1916, by reason of AW 12. It has been shown above that military tribunals other than courts martial (i. e., military commissions, military government courts) also had jurisdiction over *civil crimes which would normally be tried by the civil courts* and over breaches of military regulations, and over *all persons* in occupied territory. (*Supra,* pp. 24–25). We will now show that AW 15 preserved this jurisdiction of military tribunals other than courts martial. Moreover, we will demonstrate that courts martial probably never possessed jurisdiction over the wives and dependents of a soldier, or over any civilian except during a time and in the vicinity of military operations, and that, in any event, prior to 1916 courts martial never had jurisdiction to try a soldier's wife or any other civilian for murder or any of the other serious civil crimes enumerated in Article 58 of the pre-1916 Articles of War.

1. *AW 15 preserves to military government courts a jurisdiction concurrent with that of courts martial to try American civilians for civil crimes committed in occupied territory.* We believe that AW 15 on its face states a clear purpose to preserve to military tribunals other than courts martial the jurisdiction which they had exercised over persons and offenses prior to 1916.

This is confirmed by the legislative history of the 1916 revision of the Articles of War. That history consists of reports of the Senate Committee on Military Affairs in 1914 and 1916; S. Rept. 229, 63rd Cong., 2d Sess.; S. Rept. 130, 64th Cong., 1st Sess. There is attached to each report an appendix containing the testimony of General Crowder, the Judge Advocate General, before Senate and House Committees. This Court has recognized the authoritative character of his testimony, particularly in relation to Article 15 which he sponsored. *In re Yamashita*, 327 U. S. 1, 19, 67-71. Accordingly, and because we believe that General Crowder's explanations are conclusive on the core of this case, we set forth at length relevant passages of his testimony.

1. From S. Rept. 229, 63rd Cong., 2d Sess.:

* * * * *

> The next article, No. 15, is entirely new, and the reasons for its insertion in the code are these: In our War with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission, which during the

Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase "Persons subject to military law." There will be more instances in the future than in the past when the jurisdiction of courts-martial will *overlap* that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent. [Italics supplied.] [p. 53]

* * * * *

Mr. SWEET. There is more elasticity, I suppose?

Gen. CROWDER. Yes, sir; and the lack of statutory recognition has not prevented the Supreme Court from supporting the jurisdiction of the military commission in the trial of the gravest cases, and supporting it in the most explicit language. It is a most important institution in time of war. [p. 59.]

* * * * *

Gen. CROWDER. That is a legitimate criticism of the article and one which I had considered before proposing article 92. I was influenced to propose the article largely, perhaps, by experience during our second intervention in Cuba. It was not very long after that intervention had been inaugurated until two soldiers were charged with homicide of some natives. There was no civil court of the United States having jurisdiction. Plainly the court-martial could not try them, as the condition was not war. There were two courses open. First, to surrender them for trial before a Cuban court, which administered a jurisprudence in all respects alien, with whose procedure they were unfamiliar, and which was conducted in a language not understood by the accused soldiers; the second course was to utilize the extraordinary authority which inhered in the office of the provisional governor and which extended to the making of laws, to promulgate a special decree creating a provisional court for the trial of these men. This second course was followed, and the accused soldiers were tried by a court composed of officers of the Army, which administered the provisions of the Spanish criminal code. Should we be confronted again with the necessity of intervention, that situation is likely to repeat itself. I have been determined to avail myself of the first opportunity to pass up my share of re-

sponsibility for the continuance of these conditions to higher authority [pp. 98–99].

* * * * *

2. From S. Rept. 130, 64th Cong., 1st Sess.:

* * * * *

We now come to subhead [AW 2] (d), and here there is a change in the law which will claim your attention. In the present condition of our Articles of War "retainers to the camp" (i. e., officers' servants, newspaper correspondents, telegraph operators, etc.), and "persons serving with the armies in the field" (i. e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included.[13] They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army [p. 37].

[13] By this General Crowder means that such persons could not have been tried by court martial prior to 1916. However, as we have shown, they could have been tried by military commission.

Article 15 is new. We have included in article 2 as subject to military law a number of persons who are *also* subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation "persons subject to military law," and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced [italics supplied]:

> Art. 15. *Not exclusive.*—The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure. For the information

of the committee and in explanation of these war courts to which I have referred I insert here an explanation from Winthrop's Military Law and Precedents:

> The military commission—a war court—had its origin in G. O. 20, Headquarters of the Army at Tampico, February 19, 1847 (Gen. Scott). Its jurisdiction was confined mainly to criminal offenses of the class cognizable by civil courts in time of peace committed by inhabitants of the theater of hostilities. A further war court was originated by Gen. Scott at the same time, called "council of war," with jurisdiction to try the same classes of persons for violations of the laws of war, mainly guerrillas. These two jurisdictions were united in the later war court of the Civil War and Spanish War periods, for which the general designation of "military commission" was retained. The military commission was given statutory recognition in section 30, act of March 3, 1863, and in various other statutes of that period. The United States Supreme Court has acknowledged the validity of its judgments (*Ex parte Vallandigham,* 1 Wall., 243, and *Coleman* v. *Tennessee,* 97 U. S., 509). It tried more than 2,000 cases during the Civil War and reconstruction period. It's composition, constitution, and procedure follows the analogy of courts-

martial. Another war court is the provost court, an inferior court with jurisdiction assimilated to that of justices of the peace and police courts; and other war courts variously designated "courts of conciliation," "arbitrators," "military tribunals," have been convened by military commanders in the exercise of the war power as occasion and necessity dictated.

Yet, as I have said, these war courts never have been formally authorized by statute.

Senator COLT. They grew out of usage and necessity?

Gen. CROWDER. Out of usage and necessity. I thought it was just as well, as inquiries would arise, to put this information in the record.

Senator COLT. Yes [pp. 40–41].

General Crowder's testimony reflects in detail the jurisdiction exercised by military tribunals other than courts martial prior to 1916, and the restrictions upon court martial jurisdiction both as to persons and as to offenses. Thus, he defined the pre-1916 court martial jurisdiction over civilian in terms of "retainers to the camp" and "persons serving with the armies in the field", and he illustrated these categories by examples of persons whose activities bore a functional relationship to troops. He made it clear that by including in the new concept of "persons subject to military law" persons "accompanying" the

armies, it was sought to bring within the jurisdiction of courts martial all persons who "accompany" the army regardless of their function and purpose in doing so. Thus, soldiers' dependents accompanying the army outside the civil jurisdiction of the United States, and who were also subject to trial by military government courts, were in 1916 made subject to trial by court martial for the first time.

Also, General Crowder recognized that under the pre-1916 articles "retainers to the *camp*" and civilians "serving with the armies *in the field*" were "made subject to the Articles of War only during the period and pendency of war and while in the theatre of military operations." Then, he pointed out that as a consequence courts martial lost jurisdiction in the areas occupied as a result of the Spanish war as soon as peace was restored between Spain and the United States, and that courts martial never acquired jurisdiction over such civilians during the 1906 intervention in Cuba because of the absence of hostilities. This may well mean, as we will suggest later, *infra*, pp. 40–45, that prior to 1916 even those civilians in a functional relationship with the army could be tried by courts martial only in time of and in the vicinity of actual hostilities or combat operations. If this is correct, it means that under the pre-1916 Articles of War courts martial had no jurisdiction over such civilians in occupied territory once actual hostilities had ceased, and

that only the nonstatutory war courts would have had such jurisdiction, as in Cuba in 1906.

As to jurisdiction over offenses, General Crowder pointed out three times that military commissions or war courts had jurisdiction in occupied territory to try civil crimes which would ordinarily be tried by the civil courts, e. g., murder.

General Crowder advised both the Senate and House Committees that the introduction in AW 2 (d) of the phrase "persons subject to military law" would "subject to military law a number of persons who are *also* subject to trial by military commission. * * * As long as the articles embraced them in the designation 'persons subject to military law', and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article [AW 15] was introduced." And again, testifying before the House Committee as to the purpose of AW 15: "There will be more instances in the future than in the past when the jurisdiction of courts-martial will *overlap* that of the war courts, and the question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article [AW 15] that in such cases the jurisdiction of the war court is concurrent." (Italics supplied.)

General Crowder's definition of the existing jurisdiction of the war tribunals which was to be preserved by AW 15 completely refutes the petitioner's apparent contention (Pet, 35–50) that, apart from jurisdiction specially conferred by statute, AW 15 preserved to military commissions and other war tribunals only jurisdiction over offenses against the "laws of war." On its face, AW 15 defines the concurrent jurisdiction in terms of "offenders or offenses that * * * by the law of war may be triable by such military commissions, provost courts, or other tribunals." By the "law of war" is clearly meant that part of the law of nations which defines the powers and duties of belligerent powers, and particularly an occupying power. This is evidenced by General Crowder's inclusion in the jurisdiction of war courts of those civil crimes which the civil courts would try in ordinary circumstances, and which the occupying power is obligated to suppress. As was said in *In re Yamashita, supra,* at p. 20, with reference to AW 15: "By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin,* to any use of the military commission contemplated by the common law of war."

2. *Prior to 1916, courts martial probably lacked jurisdiction over any civilians except in an area of combat operations, and clearly were without*

*jurisdiction over soldiers' dependents bearing no functional relationship to the army as a fighting force.* From the Revolution until 1916, military law and jurisdiction were limited to soldiers, plus those civilians whose relationship to soldiers in periods of military activity was so close that of necessity they were subjected to military control. Thus, Article 32 [14] of the American Articles of War of 1775 provided that "All suttlers and retainers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army." Winthrop, *op. cit.* 956. In the Articles of War of 1806, this limited jurisdiction over civilians appears as Article 60, as follows (Winthrop, *op. cit.* 981): "All suttlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." This provision remained unchanged as AW 63 until 1916, except that in the 1874 revision the words "suttlers or" and "whatsoever" were eliminated. The phrase "subject to orders, according to the rules and discipline of war" was ap-

[14] This was taken practically verbatim from Article XXIII of Section XIV of the British Articles of War of 1765, in force at the beginning of the Revolution, as was Article 31 of the Massachusetts Articles of War of 1775. Winthrop, *op. cit.*, pp. 941, 956.

parently construed to subject such persons to trial by court martial. Digest Ops. J. A. G. 1912, p. 152.

The necessity for extending military jurisdiction to such civilians arose from the fact that in earlier days they were performing for the army certain essential functions which today are carried on by uniformed personnel. Thus, sutlers carried on the function of the present day post exchanges; civilian contractors handled much of the army's supply and transport; and the medical services relied heavily upon civilian surgeons under contract. Thus, Winthrop, *op. cit.* 98–99, includes under retainers to the camp "camp followers attending the army but not in the public service * * * sutlers, sutlers' employees, newspaper correspondents, telegraph operators, and some others"; and he defines "persons serving with the armies in the field" in terms of "civilian clerks, teamsters, laborers and other employees of the different staff departments, hospital officials and attendants, veterinaries, interpreters, guides, scouts, and spies, and men employed on transports and military railroads and as telegraph operators, etc." The functional relationship of this latter group to the Army is obvious.

Also, it should be noted that jurisdiction over civilians was limited as to *time* and *place* by the use of the words "retainers to the *camp*" and "persons * * * serving with the armies

* * * *in the* field." Winthrop concluded that the use of these terms "is deemed clearly to indicate that the application of the Article is confined both to the period and pendency of war and to acts committed on the theatre of war," citing Attorney General William's view (14 Ops. A. G. 22, 23) that the words " 'in the field' * * * imply military operations with a view to an enemy." Winthrop also concluded that "Upon a declaration of peace, or other legal termination of hostilities, the Article is no longer operative." Winthrop, *op. cit.* 101–102. See also 16 Ops. A. G. 13, 15. Similarly, the view of the Judge Advocate General was summarized as that "This article [AW 63] has been applied principally to civilians serving in a quasi-military capacity in connection with troops in time of war and in the theatre of war." Digest Ops. J. A. G. 1912, p. 151. In any event, it is clear that the pre-1916 jurisdiction over civilians "serving with the armies * * * in the field" was restricted to those civilians bearing a functional relationship to the army as a fighting force when faced with an enemy. This limitation of the former AW 63 jurisdiction in terms of function, time and circumstance left it very doubtful whether it extended (1) to American civilians performing governmental functions in occupied territory unrelated to the maintenance of the army as a fighting force, and (2) to the period of military occupation after the cessation of hostilities. As

we have seen one of the principal purposes of the 1916 revision of the Articles of War was to extend court martial jurisdiction to civilians performing such functions under such circumstances.

Petitioners contention that the wives of soldiers were subject to trial by court martial prior to 1916 under the former AW 63 is inconsistent with the terms and construction of that article, and is based upon dubious authority. Petitioner cites (Pet. pp. 19, 21, 23) the military writers Ives, Hough, Simmons and Winthrop for the proposition that the families of soldiers are "retainers to the camp" or "serving with the armies". We can find no such assertion in Ives, *A Treatise on Military Law,* or in Simmons on *Courts Martial.* In Hough, *Precedents in Military Law,* pp. 401–402, 629, there are cited two cases of the trial by "court martial" of two British soldiers' wives in India in 1824 and 1825. Winthrop merely cites Hough and Simmons.[15] There is no indication of the circumstances under which these trials occurred or, indeed as to whether a distinction was made between courts martial and other military tribunals. In any event, the status of the wife or alleged wife of an English soldier in India in 1825 has little bearing as to whether the wife of an American soldier was regarded as subject to court martial

[15] See 4 Geo. IV, ch. 81, for a special Mutiny Act applicable to India.

jurisdiction then or later.[16] Neither the petitioner nor the respondent has found any case of a wife or other dependent of a soldier who was tried by an American court martial prior to the revision of the Articles of War in 1916.

On the other hand, it is perfectly clear that the wife and other dependents of a soldier were, like any other civilians or the soldier himself, subject to trial by military commissions or military government courts for civil crimes which could not be tried by the ordinary civil courts for the area in which such crimes were committed. Just as General Scott arranged the trial of an army officer for murder before a military commission, and just as Neely of *Neely* v. *Henkel, infra,* was extradited to Cuba to be tried under Cuban law by a Cuban court created by the American military governor, so the petitioner could have been tried before a military government court for murder committed in occupied territory.

3. *Prior to 1916, courts martial lacked jurisdiction to try any civilian for murder.* Petitioner con-

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[16] While Article 63 had its practically verbatim origin in Article XXIII of Section XIV of the British Articles of War of 1765 (Winthrop, *op. cit.*, p. 941), it would be fallacious to presume from alleged Indian precedents that English military law has developed in the direction of subjecting soldiers' dependents to the jurisdiction of courts martial. For, as pointed out at pp. 55–56 of this brief, British military government courts in Germany, rather than courts martial, have jurisdiction over British civilians, including soldiers' dependents, in the British zone of Germany.

tends that prior to 1916 a court martial had exclusive jurisdiction to try a civilian in her circumstances on a charge of murder (Pet. 36–51). From this she concludes that a military government court would have possessed no jurisdiction to be preserved by AW 15. To the contrary, it is absolutely clear that prior to the 1916 revision of the Articles of War courts martial had no jurisdiction, concurrent or exclusive, to try any civilian on a charge of murder.

Until 1863, courts martial lacked jurisdiction over such capital offenses as murder, as distinguished from the military offenses defined in the Articles of War up to that time.[17] By this we mean that the Articles of War prior to that date did not even empower courts martial to try soldiers for such crimes, to say nothing of civilians. Until 1863, the Articles of War dealt with capital crimes committed by soldiers by providing for the surrender of soldiers accused of such crimes to the civil courts. See AW 33 of the

[17] We need not now consider the extent to which courts martial obtained jurisdiction over noncapital civil crimes through Article 99, which provided that (Winthrop, *op. cit.* 985)—

"All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offense, and be punished at their discretion."

For Article 99 was limited by its terms to officers and soldiers.

Articles of War of 1806, Winthrop, *op. cit.* p. 979.

It was only in 1863, as a part of the Enrollment Act (conscription act) that Congress, for the first time, gave jurisdiction to courts martial to try soldiers for serious civilian crimes, as follows (Section 30 of the Act of March 3, 1863, 12 Stat. 731, 736):

> SEC. 30. *And be it further enacted,* That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, *when committed by persons who are in the military service of the United States,* and subject to the articles of war; and the punishments for such offences shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed. [*Italics supplied.*]

It will be noted that the 1863 statute conferred jurisdiction over such crimes upon both general courts-martial and military commissions. In the 1874 revision the words or "military commission" were omitted. At one point, Winthrop *op. cit.* 833, n. 71, refers to this omission as "apparently inadvertent," and at another point as "proper for the

reason that a military commission is not the appropriate tribunal for the trial of *military* persons.'" Winthrop *op. cit.* 667.

Regardless of the reason for the 1874 omission, Winthrop was clearly correct in referring to the 1863 grant of jurisdiction in terms of "military persons." Section 30 of the 1863 statute conferred jurisdiction over such crimes as murder only "when committed by persons who are in the military service of the United States", a limitation which was embodied in AW 58 of the 1874 Articles of War and continued in effect until the 1916 revision. Petitioner repeatedly refers to the jurisdiction conferred by the 1863 Act as applying to "persons subject to military law" (Pet. 43, 44, 46). This is a serious misstatement. From 1863 to 1916 the jurisdiction of a court martial over such crimes as murder was limited to "persons in the military service of the United States." The subsequent phrase "*and* subject to the Articles of War" does not enlarge the class covered. In 1878, the Attorney General ruled, with reference to AW 60 (prohibiting frauds against the United States) of the 1874 Articles of War, that "the words 'in the military service,' there used, are not to be taken in so general a sense as to include all who are employed in connection with that service in any capacity whatever. They must be construed with the provision by which the Articles are preceded, and which declares that the latter shall govern 'the armies

of the United States.'" Upon this reasoning, the Attorney General held that civilian clerks employed by quartermasters were not amenable to the jurisidiction of a court martial. 16 Ops. A. G. 13, 16. Thus, we find General Crowder explaining that AW 60 (which became AW 94 in the 1916 Articles) was changed to apply to "any person subject to military law" rather than to any person in the military service of the United States. The significance of the change was brought out as follows:

> Mr. KAHN. Why do you prefer the new language to the old?
>
> Gen. CROWDER. Because the phrase "any person in the military service" does not include all persons subject to military law. We have these numerous retainers to the camps and contractors serving with the Army in the field who can commit fraud.

Sen. Rep. 229, 63d Cong., 2d sess., p. 104. This construction of the identical language in AW 60 is obviously applicable to AW 58 as well.

Thus, it is entirely clear that prior to 1916 neither petitioner nor any other civilian could have been tried for murder by a general court martial. Indeed, this result is confirmed by the legislative history of Section 30 of the 1863 statuate. While Section 30 was bitterly attacked, even its opponents expressly assumed that it was limited to soldiers. 62 Cong. Globe 1256, 1377, 1384. The grudging nature of this grant of un-

paralleled jurisdiction to courts martial is indicated by the fact that as reported in the Senate Section 30 would have given exclusive jurisdiction over murder and other crimes to courts martial. When it was pointed out (62 Cong. Globe 988) that "The bill as it now stands would give exclusive jurisdiction of certain crimes to the military tribunals and take them away from civil tribunals," it was amended to omit the provision for exclusive jurisdiction.

Since AW 58 of the 1874 Articles of War, as derived from Section 30 of the Enrollment Act of 1863, did not authorize courts martial to try civilians for murder and the other enumerated civil crimes, it is unnecessary to deal with the petitioner's further contention that the jurisdiction of courts martial under AW 58 was exclusive. Of course, as this Court held in *Coleman* v. *Tennessee*, 97 U. S. 509, and *Dow* v. *Johnson*, 100 U. S. 158, the "officers and soldiers" of an invading or occupying army are not subject to the laws and courts of the invaded or occupied country. As petitioner admits, the jurisdiction conferred upon courts martial by the 1863 statute was not exclusive so as to deprive the civil courts of the United States of jurisdiction to try even soldiers for civil crimes such as murder. *Caldwell* v. *Parker*, 252 U. S. 376.[18] Moreover, even

[18] The statement in *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y., 1917), relied upon by petitioner (Pet. 27–28), that a court martial has "exclusive jurisdiction" to try a civilian mate on a military transport for violation of a military order,

if civilians were triable for such crimes by courts martial, it by no means follows that they may not also be subjected to trial by courts established by the occupying power in occupied territory in the discharge of its duty to maintain order. The compelling reasons of policy which preclude subjecting soldiers of the occupying forces to the law and tribunals of the occupied territory have much less weight when applied to civilians of the occupying power, particularly those, such as soldiers' dependents,[19] who bear no functional relationship to the occupying troops. Whether courts martial should exercise exclusive jurisdiction over such persons would seem to involve a question of governmental policy rather than of individual right. At any rate, this seemed to be the view of Congress in enacting the Act of June 6, 1900, 31 Stat. 656, for the express purpose of providing for the extradition of Neely and other military govern-

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is correct in that no civil court would have jurisdiction over that offense. The opinions of the Judge Advocate General cited by petitioner (Pet. 38–39) for the alleged exclusive jurisdiction of a court martial, all involved soldiers.

[19] The doctrine of *The Exchange*, 7 Cranch 116, 139, that foreign troops in friendly passage through another country are not subject to the jurisdiction of the local courts, has not been construed to preclude subjecting soldiers' dependents to trial by the local courts. See, e. g., the agreement of March 2, 1943, between the United States and Egypt respecting jurisdiction over crimes committed by American armed forces in Egypt, which specifically provides that "the wives and children of the members of the United States Forces * * * will be amenable to the jurisdiction of Egyptian courts" (57 Stat. 1197).

ment employees to Cuba to be tried for violation of "the criminal laws in force therein" by a Cuban court, where such law and courts were created by the American military governor. *Neely* v. *Henkel,* 180 U. S. 109; 33 Cong. Rec. 5912–5923, 6452–6461. In this view, military government courts are simply a substitute for the concurrent jurisdiction which civil courts would normally exercise.

To summarize, it is clear that prior to 1916 courts martial would have had no jurisdiction to try petitioner or any other civilian for murder committed in occupied territory or elsewhere. In other words, until 1916, *only* a military government court or military commission could have tried petitioner for murder committed in occupied territory. AW 15 preserved that jurisdiction concurrently with the jurisdiction which was conferred upon courts martial for the first time in 1916.

C. The Articles of War Should be Construed to Permit the Trial of American Civilians in Occupied Territory by Civilian-Type Tribunals Rather Than by Courts Martial

It has been a fundamental of our society that civilians should be tried on criminal charges by military courts only in extraordinary circumstances. *Ex parte Milligan,* 4 Wall. 2. Consistent with that policy, the United States established in the United States Zone of Germany a system of military government courts, staffed with civilian judges trained in civilian law, and

with procedures which accord every major element of our customary procedural due process except indictment and trial by jury. Since it is much more appropriate for these courts rather than courts martial to try American civilians, there is no reason to strain the interpretation of the Articles of War to reach any other result.

Without in any way disparaging the courts martial system as prescribed by the Articles of War, we may nevertheless mention important distinguishing characteristics of the military government courts. The latter are composed entirely of experienced civilian lawyers,[20] while ordinarily only the law member of a general court martial is a lawyer. Courts martial are largely *ad hoc* tribunals in that, if not constituted to try a single or a few cases, the membership is frequently changed. The military government courts, which exercise not only a criminal jurisdiction over groups of civilians in addition to soldiers' depend-

[20] Judges and Magistrates and the District Attorneys and their assistants were required to be "graduates in law and members in good standing of the Bar of one of the States of the United States or of the District of Columbia, and must have been engaged in active legal work (as attorney at law, as Judge of a Court of Record, or as a teacher of law at a law school approved by the American Bar Association) for at least: (i) Ten years in the cases of the Chief Judge and Associate Judges of the Court of Appeals * * *; (ii) Five years in the cases of the District Judges * * *; (iii) Three years in the cases of Magistrates and District Attorneys * * *," subject to waiver of such qualifications by the Military Governor upon written recommendation of his his Legal Adviser (Military Government Ordinance No. 31, Art. 14 (1); 14 F. R. 127).

ents but also a broad jurisdiction over civil cases, have an opportunity for acquiring an expertness which is denied to non-lawyer army officers who occasionally serve on courts martial.

A political objective of the military occupation is to encourage a rebirth of democracy in Germany. Nowhere is the impact of the occupation more delicate than in the administration of justice, since German civilians are tried in these same military government courts for offenses against Allied nationals and violations of military government ordinances. We believe that it is setting a sound example to provide in occupied Germany for the trial of American civilians by courts which, while deriving their authority from the military fact of occupation, are civilian in their composition and procedure. The example is even more impressive when American and German civilians alike are tried by the same courts and by the same procedure.

We believe that it is significant that the United Kingdom, confronted with the same problems of administering justice, has established a similar system of military government courts, known as control commission courts. The British Army Act (22 Halsbury's Statutes of England, 2d ed. pp. 255, *et seq.*), like our Articles of War, applies to "persons subject to military law". Section 176 (10) includes in that class "All persons not otherwise subject to military law who are followers of or accompany His Majesty's

troops, or any portion thereof, when employed on active service.'" Section 189 provides that "the expression 'on active service' as applied to a person subject to military law means whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, *or is in military occupation of any foreign country.*" [Emphasis supplied.] The United Kingdom has not interpreted these provisions of the Army Act as precluding the establishment in the British Zone of Germany of civilian-type courts for the trial of British civilians. British Ordinance No. 68, 17 Military Government Gazette (British Zone of Control) 437; 26 *ibid.* 921; 16 Official Gazette of the Allied High Commission for Germany 179. These courts, designated Control Commission Courts "have jurisdiction over all persons in the British Zone, except persons *other* than civilians, who are subject to Military, Naval or Air Force Law, and are serving under the command of the commander of any forces of the United Nations in the Federal Republic of Germany." Article II. Like the United States Military government courts, these British courts consist of trial courts and an appellate court staffed with experienced lawyers, and exercise criminal jurisdiction. It is interesting to note that under this ordinance British subjects are

entitled to be tried by a jury consisting of seven British subjects on criminal charges for which the maximum penalty is death or a sentence of imprisonment exceeding five years. At any rate, it is significant that the United Kingdom, which, like ourselves, has carefully limited the jurisdiction of courts martial over civilians, has also found it desirable to provide civilian courts and procedures for the trial of British civilians accompanying the British occupation forces in Germany.

Petitioner does not even contend that the procedure by which she was tried deprived her of any element of due process of law as we know it. That procedure was prescribed by Military Government Ordinance No. 32, entitled Code of Criminal Procedure for United States Military Government Courts for Germany, 14 F. R. 128–132. Ordinance No. 32 provides for a preliminary hearing on criminal charges (Articles II and III), for "charges" containing "a plain and concise statement of the facts alleged to constitute the offense and the place and time thereof in order that the accused may have the information reasonably necessary to enable him to prepare his defense"; he is entitled to the assistance of counsel and in cases other than those before a Magistrate, i. e., serious crimes, he must be provided with counsel if he is unable to obtain counsel himself (Article IV); he is entitled to present

evidence on his own behalf and to cross-examine the prosecution witnesses (Article V). "The admissibility of evidence shall be in accord with the Rules of Evidence generally recognized in the trial of criminal cases in the United States. The most important of these Rules are summarized in Chapter 25 of the Manual for Courts Martial, U. S. Army" (Article VI (1)). The privilege against self-incrimination is specifically recognized (Article VI (3) (4)), as are the privileged communications of husband-wife, parent-child, attorney-client, and priest-penitent (Article VII (4)). Duly authenticated depositions taken upon notice may be received in evidence in non-capital cases (Article VI (6)). The military government courts are empowered to administer oaths, subpoena witnesses and admit to bail. Special procedures are provided for dealing with the issue of insanity and juvenile offenders. (Article VIII (7) (8).) The defendant may appeal both on "questions of law and of fact except that, in dealing with questions of fact, the Court shall set aside or reverse the decision of the District Court in criminal cases only if the evidence does not support a finding of guilt beyond a reasonable doubt." Ordinance No. 31, Article 12 (14 F. R. 127). The opinions of the Court of Appeals are regularly published in English and German for the guidance of the lower courts.

D. Congress, With Knowledge That AW 15 has Been Interpreted to Permit the Trial of Soldiers' Dependents in Occupied Territory by Military Government Courts, Rather Than by Courts Martial, Has Ratified That Interpretation by Re-enacting AW 15 Without Change in 1950, and by Appropriating Funds to Maintain Such Courts.

The establishment of the United States Military Government Courts for Germany with criminal jurisdiction over all American civilians in the American Zone of Germany has been no secret. Military Government Ordinances 31, 32 and 33, which established the courts and prescribed their composition, jurisdiction and procedure, were published in the Federal Register on January 11, 1949 (14 F. R. 124–133). The trial of Mrs. Ybarbo before such a court was given wide publicity in this country.

In any event, when Congress was considering what became the Uniform Code of Military Justice (Act of May 5, 1950, 50 U. S. C., Supp. IV, 581), both the Senate and House Committees on Armed Services were specifically advised of the establishment in occupied territory of military government courts exercising criminal jurisdiction over American civilians. In the *Hearings before the Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., on the Uniform Code of Military Justice,* the following is significant (p. 876):

> Mr. Elston. That this wife of the soldier who recently was tried. I forget the name.
>
> Mr. Larkin. Mrs. Ybarbo.

Mr. ELSTON. Yes. She was tried for murder and was given a life sentence and it was reduced to 5 years because the law of Germany requires 5 years as maximum punishment.

Mr. LARKIN. Yes.

Mr. ELSTON. She was not tried by court martial.

Mr. LARKIN. No.

Mr. ELSTON. By a military court. She was tried by one of those special courts that had been set up in Germany.

Mr. LARKIN. Yes, sir.

Mr. ELSTON. Now do you think there is any possibility of this section being construed as divesting those courts of jurisdiction over families of soldiers?

Mr. LARKIN. No. It could not specifically because we have in another part of the code an article which specifically guards their jurisdiction.

Mr. SMART. They have concurrent jurisdiction, Mr. Elston.

Mr. LARKIN. Yes, sir.

Mr. ELSTON. If you say it is mentioned later on, we do not need to bother with it now.

Mr. LARKIN. Yes. So this could not be construed as divesting any occupation court, military tribunal, or provost court of any jurisdiction that it currently has today.

Mr. BROOKS. I just received today a letter from a mother saying she was going to visit her daughter who is the wife of

an officer in Germany. When she arrives over there the court, that is the military court, would have concurrent jurisdiction under this code with the court martial in the trial of the case if one should arise, would they not?

Mr. LARKIN. The occupation court would have jurisdiction over her if she committed any crimes.

Mr. SMART. I do not see where that particular person would come under the code. She is not serving with, employed by, or accompanying the forces.

Mr. LARKIN. That is right.

Mr. SMART. She would not, in any case, in my opinion, be subject to this code. Whereas the family of the soldier, be it officer or private, does accompany him and he certainly is a part of the forces.

I do not think it could be construed that this provision would ~~be broad~~ enough to cover the relative who goes for a mere visit.

And further, at p. 975:

Mr. BROOKS. Now, let us proceed with article 21.

Mr. SMART (reading):

ART. 21. Jurisdiction of courts martial not exclusive.

The provisions of this Code conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders

or offenses that by statute or by the law of war may be tried by such military commissions, provost courts, or other military tribunals.

References: A. W. 15; proposed A. G. N., article 5 (f).

Commentary: The language of A. W. 15 has been preserved because it has been construed by the Supreme Court. (See *Ex Parte Quirin*, 317 U. S. 1 (1942).)

Mr. ELSTON. Mr. Chairman, might we have some explanation for the record of what is meant by "military commission, provost courts, or other military tribunals"?

Mr. BROOKS. You want to undertake that, Mr. Larkin?

Mr. LARKIN. Well, which part of it concerns you, Mr. Elston? Is it the "other military tribunals"?

Mr. ELSTON. No. I think for the record there ought to be an explanation of all that. "Such military commissions"—someone on the floor may want to know what a military commission is.

Mr. LARKIN. I believe a military commission may be defined as a tribunal which can be set up for the trial of persons who offend against the law of war.

Mr. ELSTON. Appointed by the President?

Mr. LARKIN. By the President. You have an example in that Sabateur case. That was a military commission.

A provost court is—what, Colonel Dinsmore? Is that a military government court or is it——

Colonel DINSMORE. It is an occupation court.

Mr. LARKIN. It is an occupation court; a court that may be set up by the occupation authorities within the area that they occupy.

There are other military tribunals. Are they occupation courts, too? What other kinds are there?

Colonel DINSMORE. Courts of inquiry.

Mr. ELSTON. Well, a court of inquiry does not have power to impose punishment, does it?

Mr. LARKIN. No. We have a provision in article 136 here for courts of inquiry, which cannot impose punishment or make a finding of guilty or not guilty.

Colonel DINSMORE. I suppose a Military government court is a military tribunal.

Mr. LARKIN. And that is a court that is similar, then, to the provost court; is that right?

Colonel DINSMORE. Yes; with greater jurisdiction.

And at p. 1061:

Mr. BROOKS. I would like to ask one question. It is going back, and I think it has been covered, but I did not fully understand it. Exactly what is the definition of a provost court?

Mr. LARKIN. Well, I suppose the name itself is derived from the Provost Mar-

shal's Department, which is generally the Department that controls the military police.

Mr. BROOKS. How does that differ from a court martial?

Mr. LARKIN. Well, a provost court, like other military commissions and tribunals which are usually used in occupied territories and which are the creatures of the occupying authority, is operated in accordance with whatever rules are prescribed for them. Many of the military or provost courts, for instance, that operate in occupied territories will follow, to a large extent, the court-martial procedures, but they may specifically apply the local law.

In many recent cases in occupied territory they have followed the procedures of court martial, but specifically they applied the German law. They are ad hoc special courts for a special purpose.

Mr. BROOKS. Are they not intended to cover the civilians?

Mr. LARKIN. Civilians who are not subject to the code.

Mr. BROOKS. Civilians who are not subject to the code. Is that right, Colonel?

Colonel DINSMORE. It is for the trial of civilians for the occupied territory.

Mr. SMART. I might add, if you will forgive the personal reference, that I was a provost court overseas appointed by virtue of the proclamations which gave General MacArthur the authority, which subsequently was delegated down to the Sixth Division. My jurisdiction was 5 years con-

finement or $5,000, either one or both. I sat alone as one judge and I tried nothing but civilians not subject to the Articles of War.

In *Hearings before the Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess., on the Uniform Code of Military Justice,* T. H. King, National Judge Advocate Reserve Officers' Association, requested restriction of the jurisdiction of military tribunals by specific limitations, substantially in the form of the argument of petitioner herein, speaking as follows (p. 161):

> Now, the next thing, if I may say so, sir, to make this uniform military justice is to provide for military courts. We have got set up in European countries and in the Pacific, courts established by administrative fiat. They are set up to try people for things up to and including the death penalty, and they have left it to one man's word in the European theater as to whether they were to die or live or whether they will serve for 20 or 30 years.
>
> We do not know whether they are going to keep up the military courts when the civilians take over or not, and there is a question as to whether a military court can render a sentence of 10 years, if they are going to terminate their functions in 3 years.
>
> Why not determine exactly what authority the military have to set up courts.

> We read of military commissions; we read of provost courts; we now have military government courts. Who has jurisdiction over whom? The question in the Ybarbo case, which Senator Saltonstall spoke about, was raised as to which court had jurisdiction, if we can believe the press, and I think we can.
>
> Senator KEFAUVER. In other words, you want to take the right of the commander to reduce the sentence away from him?
>
> Mr. KING. No, I want the Congress through its legislative functions to set up or determine what courts will be established, which will affect the trial of citizens of the United States overseas. We have got more civilians over there who are subject to military government than we have got soldiers. It is amazing the number of civilians.
>
> Every State Department employee over there is subject to military government in Germany and Austria. All these people working for ECA are subject to military control in those occupied countries, and they are not entitled to a trial by jury, and there is no system established to give them a right of trial by jury.

In brief, the Committees of Congress were specifically informed that the concurrent jurisdiction defined in AW 15 had been interpreted to permit the trial of American civilians in occupied territory—and particularly a soldier's wife, such as petitioner—by military government

courts instead of courts martial. With such knowledge, Congress neither amended nor deleted AW 15; rather, it reenacted AW 15 practically verbatim as Article 21 of the new Code. Both Committees reported that "This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial. The language of AW 15 has been preserved because it has been construed by the Supreme Court (*Ex parte Quirin*, 317 U. S. 1 (1942))." S. Rept. 486, p. 13, H. Rept. 491, p. 17, both 81st Cong., 1st Sess.

Moreover, in appropriating funds for the government of occupied areas, including Germany, for the fiscal years 1951 and 1952, Congress has specifically provided that such funds may be used for "expenses incident to maintaining discipline and order in occupied areas (*including trial and punishment by courts established by or under authority of the President*)." [Italics added.] Public Law 759, 81st Cong., 2d Sess., ch. XI, Title III; Public Law 253, 82d Cong., 1st Sess., ch. IX. Such appropriations constituted a Congressional ratification of what had been done. *Isbrandtsen-Moller Co.* v. *United States*, 300 U. S. 139.

## II

THE COURT WHICH TRIED PETITIONER WAS PROPERLY CONSTITUTED AND ITS PROCEDURES ARE NOT INCONSISTENT WITH ANY ACT OF CONGRESS.

Under this point, we will discuss miscellaneous contentions made by petitioner.

1. Petitioner contends that since Mr. McCloy, the United States High Commissioner for Germany, is a civilian, he was without authority to create a military tribunal which, if is alleged, must be appointed by a military commander empowered to appoint a general court martial (Pet. 52–58). It may be that only a military commander can appoint a military tribunal to try soldiers, but that is not the present issue. Clearly, the President can exercise his powers as Commander in Chief in occupied territory through civilians entitled military governors or otherwise. In 1862, the President appointed civilian "military governors" of Tennessee, North Carolina and Louisiana; in 1865 civilian "provisional governors" were appointed by the President for North Carolina, Mississippi, Georgia, Texas, Alabama, South Carolina and Florida. Winthrop *op. cit.* 802. In *Handlin* v. *Wickliffe,* 12 Wall. 173, this Court apparently treated as valid the appointment of a civilian as military governor. In 1906, Mr. Taft, then Secretary of War, was appointed "Provisional Governor of Cuba," which was placed under military occupation. 1 Hackworth, *Digest of International Law,* 148–149. Precedents aside, it would be absurd, if constitutionally possible, to deny the President the power to discharge his functions in occupied territory through civilian officers. Since a civilian can be appointed by the President to be military governor of occupied territory, it follows that he, as well as a sol-

dier acting as military governor, may discharge the Nation's obligation under international law to maintain law and order by establishing military government courts. Moreover, Congress has expressly recognized that the President may carry out the government of occupied territories through other departments than the Department of Defense without thereby changing the fundamentally military basis of the occupation. In appropriating funds to the Department of the Army for the government or occupation of certain foreign areas (Act of October 6, 1949, c. 621, 63 Stat. 709, 712), Congress specifically provided that "the President may transfer to any other department or agency any function or functions provided for under this appropriation." And see Winthrop, *op cit.* 799, 801–802.

2. Petitioner further contends (Pet. 53) that military government courts must be composed of army officers. We may assume that a military commission or other military tribunal appointed to try soldiers must be composed of soldiers. But, again, it is well established that civilians may be appointed to act as judges of military government courts (*supra*, p. 23).

3. It is also contended that military government in Germany terminated on September 21, 1949, the date upon which the Allied High Commission became operative (R. 60) and the date upon which Mr. McCloy assumed the exercise of "all of the governmental functions of the United

States in Germany (other than the command of troops)" (R. 58–59, 67–68). From this petitioner concludes that when her offense, trial and conviction occurred in October 1949, the United States High Commissioner could not exercise the powers of military government to bring her to trial.[21] It is true that that date represents another step in the progressive restoration of self-government to the Germans. However, the nature of the governmental functions and tribunals of the United States in Germany is to be determined from the source of their authority. That source has been military conquest, followed by a military occupation which has continued to date. When a similar contention was made in *Neely* v. *Henkel, supra,* this Court replied that it is "the function of the political branch of the Government to determine when such occupation and control shall cease" (180 U. S. at p. 24).

4. Petitioner also contends that she could not be tried for a violation of the German Criminal Code. Clearly, it is the duty of the occupying power to deal with crimes committed by its civilian nationals by prescribing substantive penal law, as well as by establishing appropriate tribunals. It is the general law that local criminal law in an occupied area continues to bind civilians unless changed by the occupying power. *Dow* v. *Johnson,* 100 U. S. 158, 166; *Ketchem* v. *Buckley,*

[21] However, we assume that petitioner would oppose extradition to Germany for trial by a German court.

99 U. S. 188, 190. In addition to this, a proclamation of General Eisenhower of September 19, 1945, 12 Fed. Reg. 6997, provided that German law should be applicable in the occupied territory until repealed or superseded by a new law enacted by the military government.[22] General Crowder tells of the trial of two American soldiers in Cuba in 1906 under the local criminal code. *Supra*, p. 33. Similarly, Neely of *Neely* v. *Henkel, supra,* was extradited to Cuba to be tried for violation of the Cuban Postal Code promulgated under the authority of the military governor. Applying the German Criminal Code (purged of its Nazi additions) to American civilians in Germany was thus consistent with international law and historic American practice.

Moreover, it was highly appropriate and practical to adopt the German Criminal Code for this purpose. For one thing, the military government courts had jurisdiction not only over Germans but over other United Nations nationals in the American Zone, most of whom would be more familiar with a Continental code. Also, by

[22] The new Geneva Convention Relative to the Protection of Civilian Persons in Time of War, which has been signed by the United States and is pending before the Senate, provides in Article 64, as follows:

"The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention."

adopting the German Criminal Code for this purpose, we thereby established for such persons a uniform code of civil crimes throughout West Germany, since the British and French occupation authorities did the same thing. See British Ordinance No. 68, as amended, Article III.

5. Finally, petitioner contends that her conviction was void in that the military government court which tried her failed to follow the procedures prescribed by the Articles of War for courts-martial. Her contention is not that the procedure in the court which tried her is less fair than that of a court-martial or in any way unfair, but merely that it is different. First she asserts that "The practice and procedure normally followed in courts-martial cases must likewise be followed before a military commission, in a case such as this which does not involve an enemy national," citing *Manual for Courts-Martial*, 1949, Chap. 1, par. 2; Basic Field Manual, FM 27–5, 22 Dec. 1943; *In re Yamashita, supra;* 29 Va. L. R. 317; 32 Am. J. Int'l Law 832. (Pet. 53–54). The cited military authorities do not support petitioner's contentions but constitute suggestions and recommendations for practice with respect to military tribunals other than courts-martial.[23]

[23] The cited Basic Field Manual has been superseded by the 1947 Manual FM 27–5, October 14, 1947, which no longer contains even the language which petitioner urges as supporting her contentions. The earlier language of the 1943 Manual included the following (pp. 50–54):

Petitioner apparently relies upon this Court's suggestion in *In re Yamashita*, 327 U. S. 1, 20, that the Articles of War govern the trial before military commissions of "persons subject to mili-

"When an area is occupied and placed under military government, the commanding officer in the theater of operations should establish military commissions and provost courts to try inhabitants for offenses affecting the military administration. *These courts in general will not be circumscribed by the statutory and other rules governing courts martial;* and their number, types, jurisdiction and procedure will be determined by the theater commander, subject to instructions from higher authority. The term 'military courts,' as used in this manual does not include 'courts martial.' [Italics supplied.]

* * * * * * *

"In providing for military commissions, which may consist of any number of officers, the commander will appoint not less than three except in extraordinary circumstances. In general, the rules for army or navy general courts martial will serve *as a guide* in determining the compositions of military commissions, including the designation of law members, trial judge advocates, and necessary assistants. The provision for a law member, with powers and duties similar to those of a law member of an army general court martial, promotes sound decisions on matters of law and speed in procedure, and is *recommended* for such military commissions for both the army and the navy. [Italics supplied.]

* * * * * * *

"It is customary and *usually* advisable to appoint commissioned officers as members of military courts and as judge advocates and defense counsel. * * *. [Italics supplied.]

"Military commissions and provost courts may be appointed or convened by the officer in command in the theater of operations. He may delegate this power to subordinate commanders or civil affairs officers. * * *

* * * * * * *

"Military courts have jurisdiction over all persons within the occupied territory except those having diplomatic immu-

tary law as enumerated in AW 2" (Pet. 52). In that case, the Court held that AW 25 and AW 38 did not preclude the use of depositions and hearsay evidence in the trial before a military commission of a person other than persons enumerated in AW 2. Assuming that such of the Articles of War as AW 25, which specifically refer to

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nity, and except prisoners of war; but, *unless there are cogent reasons to the contrary* in a particular case, persons subject to military or naval law of the United States or its allies *should be* tried by court martial. [Italics supplied.]

* * * * *

"* * * It is *advisable* that military courts, in the trial of offenses directly affecting military government, be directed to follow the rules of evidence for Army or Navy courts martial. It is *not required* that this be done, however, as there may be instances when it will be appropriate to disregard such rules. * * *" [Italics supplied.]

The language of the 1947 Manual specifically abrogating even the indirect implications which petitioner seeks to derive from the earlier manual is as follows (p. 66):

"Military government tribunals are not governed by the provisions of the Manual for Courts-Martial nor by the limitations imposed on courts-martial by Articles of War. Experience has demonstrated that in administering justice in an occupied area it is desirable to follow forms of judicial procedure which are generally similar to the forms of procedure to which the people are accustomed. * * *".

Again, it is true, as contended by petitioner (Pet. 41), that General Crowder, in 1916, referred at one point to courts-martial and other military tribunals as having "the same procedure," but the remark was clarified in the same discussion by his quotation from Winthrop describing the procedure as only an "analogy of courts-martial" (S. Rept. No. 130, 64th Cong., 1st sess., p. 40).

military tribunals generally, apply to the trial by any military tribunal of persons enumerated in Article 2, it by no means follows that the composition and procedure of military tribunals other than courts-martial must be governed in all other respects by the Articles of War. While AW 25, dealing with depositions, specifically referred to military tribunals, AW 4 and 8, prescribing the qualifications of members of courts-martial and of persons appointing them, made no reference to military tribunals other than courts-martial. Nor can AW 38 be extended to serve such a purpose, for AW 38 merely *authorized* the President to prescribe the procedure of "courts martial, courts of inquiry, military commissions, and other military tribunals"—authority which he has never exercised except with respect to courts-martial. Since the Manual for Courts-Martial (1949) is expressly limited to the proceedings of courts-martial, it is evident that the President has not exercised his authority to prescribe uniform rules for other military tribunals, but, through his troop commanders and military governors, has adopted procedures suitable for particular situations. Moreover, such a complete assimilation of the composition and procedure of all types of military tribunals to courts-martial would render meaningless the choice of tribunals

which AW 15 sought to preserve in those cases which prior to 1916 were not triable by courts-martial. Nor can it be assumed that when an informed Congress in 1950 reenacted AW 15 as Article 21 of the Code of Military Justice, it was merely playing with words to preserve the jurisdiction of military government courts which, according to petitioner, must be general courts-martial in everything but name. This last consideration is equally applicable to every contention of petitioner treated under this point.

It is emphasized that petitioner does not allege violation of any Article of War which is specifically applicable to military tribunals other than courts martial.

## CONCLUSION

Prior to 1916, only a military commission or military government court could have tried petitioner for murder committed in occupied territory. While the 1916 amendments to the Articles of War made petitioner subject to trial by court martial for that offense, AW 15 preserved the preexisting jurisdiction of other military tribunals. The interpretation of AW 15 and the policy to provide essentially civilian courts for the trial of American civilians in occupied Germany have been ratified by Congress. Accord-

ingly, the judgment of the court below should be affirmed.

Respectfully submitted.

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## APPENDIX A

The Constitution, Art. II, Sec. 2 provides:

> The President shall be Commander in Chief of the Army and Navy of the United States * * *.

The pertinent provisions of the Articles of War, as amended by the Act of June 4, 1920, c. 227 Subch. II, 41 Stat. 787, and the Act of June 24, 1948, c. 625, Title II, 62 Stat. 627, provided as follows:

> ART. 2 [10 U. S. C. 1473]. Persons subject to military law.
>
> The following persons are subject to these articles and shall be understood as included in the term "any person subject to military law", or "persons subject to military law", whenever used in these articles: * * *.
>
> * * * * * *
>
> (d) All retainers to the camp and all persons accompanying or serving with the Armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the Armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;
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> * * * * * *
>
> Art. 12 [10 U. S. C., Supp. IV, 1483]. General courts martial.

General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals * * *.

Art. 15 [10 U. S. C. 1486]. Jurisdiction not exclusive.

The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions, provost courts, or other military tribunals.

Art. 38 [10 U. S. C. Supp. IV, 1509]. President may prescribe rules.

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary to or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules and regulations made in pursuance of this Article shall be laid before the Congress.

Art. 92 [10 U. S. C. Supp. IV, 1564]. Murder; rape.

Any person subject to military law found guilty of murder shall suffer death or imprisonment for life, as a court-martial may direct; but if found guilty of murder not

premeditated, he shall be punished as a court-martial may direct. * * *: *Provided*, That no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace.

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